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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-369

FURNCO CONSTRUCTION CORPORATION,
Petitioner,

vs.

WILLIAM WATERS, SYLVESTER WILLIAMS, WILLIE G. PEARSON, VANDY HAWKINS, CURTIS GILMORE, DONALD SAMUELS, ROBERT NEMHARD, AND WILLIAM SMITH,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF OF PETITIONER

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BRIEF OF PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals and the denial of rehearing and rehearing *en banc* are reported at 551 F. 2d 1085 and are reproduced in the Appendix to the Petition for Certiorari[1] at pages A1-A11. The decision of the District Court is reported unofficially at 13 FEP Cases 1020 and is reproduced in the Appendix to the Petition for Certiorari at pages A12-A22.

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1. References to the certiorari appendix will be made with the designation ("C. A. ....."). References to the single appendix will be made by the designation ("A. ....."). References to the record, Joint Exhibits, and Defendant's Exhibits will be made, respectively, as ("R. ....."); (Jt. Ex. .....); and ("Def. Ex. .....").

JURISDICTION

The opinion and judgment of the Court of Appeals were entered on March 8, 1977. A timely filed petition for rehearing and suggestion for rehearing *en banc* was denied on June 8, 1977. This Court's jurisdiction is invoked under 28 U. S. C. § 1254(1), the Petition for a Writ of Certiorari having been filed on September 3, 1977, within ninety (90) days after the Court of Appeals' denial of rehearing.

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are relevant portions of the Civil Rights Act of 1964, as amended, 42 U. S. C. § 2000e *et seq.*, the Civil Rights Act of 1866, 42 U. S. C. § 1981, and the National Labor Relations Act, as amended, 29 U. S. C. § 141 *et seq.*, and are reproduced in the appendix to the Brief.

QUESTIONS PRESENTED

1. Whether a hiring system not shown to result in disparate impact or treatment of prospective minority employees and found by the District Court to be justified by business necessity and legitimate business reasons may be found to be racially discriminatory by the Court of Appeals merely because it is subjective and because the Court of Appeals substitutes its judgment for that of the District Court as to what constitutes legitimate business reasons.

2. Whether the Seventh Circuit, in reversing the judgment of the District Court, erred in finding as irrelevant to the issue of racial discrimination in hiring, statistics demonstrating that in hiring highly skilled bricklayers, the employer hired Negroes in a percentage substantially in excess of their statistical presence in the relevant labor force.

3. Whether a court may find an employer guilty of racial discrimination in employment due to alleged disparate treatment in hiring without a finding of discriminatory intent or motive.

STATEMENT OF THE CASE

Petitioner, Furnco Construction Corporation ("Furnco"), is engaged in industrial construction, specializing in refractory installation in steel mills and, more particularly, the relining of blast furnaces (R. 664).[2] In performing such relining, the brickwork involved—firebrick—is considered a specialized trade within the bricklaying industry (R. 35, 51, 230, 773).

In contrast to red brick or external brickwork, the purpose of which is to basically meet weatherproofing and aesthetic considerations, firebrick is intended to provide fire and heat retention and, as such, the quality of firebrick work is more critical (R. 27-28). Its performance is also far more difficult, particularly in regard to relining a blast furnace.[3] Indeed, the District Court found that firebrick work involving a blast furnace reline is a specialized skill even among fire bricklayers (C. A. at A14; Findings ¶ 6(a)).

In August 1971, Furnco contracted with Interlake, Inc., to reline the "A" blast furnace at Interlake's Chicago Blast Furnace Plant (Def. Ex. 25; R. 629, 708). While this furnace was being relined, Interlake's steel producing capacity was cut by more than two-thirds and 66 steelworkers were laid off (R. 631-33). In order to minimize its financial loss of $100,000 a day (R. 630, 632), Interlake insisted that the relining be performed on a twenty-hour-a-day, seven-day-a-week schedule (Def. Ex. 25; R. 629-30, 708).

2. A steel mill blast furnace is lined with refractory materials (firebrick) capable of containing the molten metal that accumulates in the furnace. Due to the extraordinary stress placed upon the refractory materials, a blast furnace interior must be periodically relined with new firebrick in order to maintain the integrity of the blast furnace (R. 627, 628).

3. For example, blast furnace work is very precise, requiring unusual and complicated cuts. In addition, the bricks must be laid in precise geometric patterns with great care given to maintaining tight joints between the bricks (R. 35, 136, 267, 269, 586, 773).

Indeed, speed in performing a blast furnace reline is of such importance that companies such as Interlake often award such jobs not to the lowest bidder, but to the bidder who can perform the work in the shortest possible time (R. 665). Even Plaintiffs' witness, Nicholas Popovic, President of Bricklayers Local 21, characterized a furnace reline as "emergency work" because of the cost and lost production incurred by the mill (R. 47).

Speed, however, is as important to a contractor such as Furnco as it is to a steel mill such as Interlake. Reline jobs such as this are contracted on a firm price basis and labor typically represents 80 per cent of Furnco's cost (R. 668). Furnco's ability to make a profit on the job was thus inextricably related to how quickly its crafts could finish the work (R. 665). Moreover, the expense to Furnco to finance the job was entirely dependent on how fast it completed the work (R. 666).

In addition to speed, it was even more essential that the brickwork performed by Furnco be of the highest quality (R. 633-34). As noted, the purpose of the refractory materials is to retain the molten material. Improper installation jeopardizes the integrity of the blast furnace (R. 634). If improper brickwork were performed, serious safety hazards could develop, including the threat of the furnace itself exploding while in operation (R. 633-34, 639, 667). Indeed, such an explosion previously occurred at Interlake resulting in the death of four people and extensive property loss (R. 660, 661).

A high quality of brickwork must also be obtained to minimize future maintenance costs and further loss of steel production, for which Furnco could be liable if it improperly relined the furnace (R. 634, 667). Finally, poor quality work could endanger Furnco's reputation and its ability to obtain future jobs (R. 634, 666). The quality of work Furnco performs for one steel mill is well known in the industry (R. 666) and poor performance on even one job would adversely affect its ability to secure commitments to perform similar work in the future (R. 634).

Not surprisingly, in light of the critical need for speedy and high quality performance and the fact that firebrick work on a blast furnace reline is a unique and specialized trade, Furnco sought to ensure that it employed on the Interlake job only fire bricklayers known to be competent and experienced in performing such work.[4] Interlake expected this (R. 635), as did Furnco (R. 669).[5]

Upon award of the Interlake contract, Furnco hired Joe Dacies as job brick superintendent. Dacies had worked in that capacity for Furnco on other jobs. Although Furnco gave Dacies complete authority regarding selection, hiring and retention of bricklayers, it was explicitly understood that he would, as was his practice, hire only experienced fire bricklayers who he knew were highly competent in the specialized work involved (R. 669, 771).

Moreover, it was the practice of Dacies, Furnco and the industry, not to hire at the gate (R. 37, 671-72, 771-72).[6]

4. One reason Furnco hires a particular individual to be a brick superintendent is his ability to contact and hire proven and experienced fire bricklayers personally known to him (R. 669). As explained by John Wright, General Manager of Furnco, the brick superintendent performing work for Furnco would typically hire fire bricklayers who had worked for him in the past and whose ability he was personally aware of. If unable to fully staff the job with such persons, he would typically contact other Furnco superintendents in the area for the names of such qualified bricklayers, or, on occasion, ask supervisors or bricklayers for recommendations (R. 671).

5. The hiring of fire bricklayers with proven experience was acknowledged by Respondents' witness Popovic as being the industry practice (R. 35). Thus, he testified that when he supervised jobs, he attempted to hire persons he knew from his own experience could perform such work (R. 36, 47-50).

6. Hiring at the gate, as used herein, refers to the accepting of applications at the job site gate. It is interesting to note that although Plaintiffs have alleged throughout this case that applying at the gate is the only way they have been able to obtain jobs, this allegation is completely unsupported by the record. Six of the eight Plaintiffs testified that they had previously been contacted by other contractors regarding work on other jobs without ever seeking work at the job site (R. 138-Nemhard; R. 273-Samuels; R. 346, 366-Smith; R. 402-403-Williams; R. 537-Waters; R. 584-85-Pearson). Indeed, Pearson testified that this is the "typical" way of obtaining work (R. 585).

Indeed, Dacies did not take the names of any persons—black or white—appearing at the gate (R. 773, 786). The District Court found that Furnco's policies of refusing to hire at the gate and instead hiring bricklayers known by its superintendent to be experienced and qualified "were racially neutral, were justified as a business necessity in that they were necessary for the safe and efficient operation of Furnco's business, and were based upon legitimate nondiscriminatory business reasons." (C. A. at A18; Findings ¶ 15).

Prior to the start of the job, Furnco General Manager Wright also instructed Dacies that in order to ensure equal employment opportunity on the Interlake project, and to assure compliance with Furnco's voluntary affirmative action program, he should attempt to employ at least 16 per cent black fire bricklayers on the Interlake job. This figure was considerably in excess of the percentage of black bricklayers in the local labor market (R. 673, 674).[7] As found by the District Court, during the relevant period, "5.7 per cent of the bricklayers in the relevant labor force were minority group members." (C. A. at A16; Findings ¶ 12). In fact, Furnco's hiring practices resulted in Negro bricklayers working 13.3 percent of the man-days worked on the Interlake job (C. A. at A16; Findings ¶ 11), or more than double the minority representation in the relevant labor market.

7. This affirmative action program was initiated by Furnco following a job it performed at the U. S. Steel South Works Plant in 1969-1970 (R. 673, 674). Although it employed numerous black bricklayers on that job, Furnco was nevertheless charged with racial discrimination. *See Batiste* v. *Furnco*, 503 F. 2d 447 (7th Cir. 1974), *cert. denied*, 420 U. S. 928 (1975). Thereafter, it was decided to ensure that on all jobs Furnco performed in the Chicago area it employed a percentage of qualified black bricklayers considerably in excess of the percentage of black bricklayers in the local labor market (R. 674). The 16 per cent figure was considered by neither Wright nor Dacies to be a quota, but rather, a guideline (R. 673, 777-78). Thus, during the job, this figure was at times exceeded and at times not met (Def. Ex. 22; R. 621-22). At peak employment (October 23-25), 15.2 per cent of the bricklayers on the job were black.

In actually hiring bricklayers on the Interlake job, Dacies attempted to contact and hire only fire bricklayers whom he knew from his own personal knowledge to be experienced and competent in this type of work (R. 769). In addition, he sought out the names of other experienced fire bricklayers, both black and white, from his general foreman, his foreman, one employee (a black) and another Furnco superintendent working in the area (R. 781-86).[8]

Respondents, eight black bricklayers who alleged that they appeared at the gate seeking employment, brought this action alleging that Furnco's hiring practices—particularly its refusal to hire at the gate—were racially discriminatory under the Civil Rights Act of 1866 and 1964, as amended.[9]

Terming this "a most unusual case," the District Court, after a six-day trial, found that not only had Plaintiffs failed to prove their case, but Furnco had "proven what it was not required to . . . Furnco has proven beyond all reasonable doubt that it did not engage in . . . racial discrimination . . . in its employment practices in regard to bricklayers on the Interlake job." (C. A. at A22; Conclusions ¶ 10; R. 939-40.)

8. At the time Wright had instructed Dacies regarding Furnco's affirmative action program, Dacies knew the names of several black bricklayers (R. 778) and, in fact, hired several during the short period of time that he was in charge of Furnco's project at U. S. Steel in 1969 (R. 875). Because he had for some time prior to the Interlake job been working out of the area, he did not have their addresses or phone numbers (R. 778). Therefore, prior to the start of the job he contacted another Furnco superintendent, Al Urbanski, who had been working in the area. He obtained the phone numbers and addresses from Urbanski and obtained the names of other qualified black bricklayers from him (R. 777-78). Critically, before the job had started, Dacies had the names of both black and white bricklayers, whom he proceeded to call as the job progressed (Def. Ex. 22; R. 621-22). Moreover, after the job was in progress, Furnco's General Manager, John Wright, contacted Dacies with the names of the Plaintiffs in the *Batiste* suit, note 7 *supra*, and informed him that these individuals were black bricklayers who alleged they could perform firebrick work and that Dacies might consider hiring them (R. 678). Dacies hired several of them (R. 781-86).

9. It should be noted that of the eight, four were hired on the job.

Moreover, the District Court found that Furnco's hiring policies were not only racially neutral on their face and in their application, but were entirely job related and were "beyond a reasonable doubt . . . justified as a business necessity in that they were necessary for the safe and efficient operation of Furnco's business, and were based upon legitimate nondiscriminatory business reasons." (C. A. at A20-A21; Conclusions ¶ 5). In reaching this conclusion, the court made detailed findings both as to the exigencies of performing this highly skilled work and the serious deficiencies of hiring at the gate (C. A. at A13-A15; A17-18; Findings ¶ 6, 7, 14).

The court further found that, rather than being a pretext to exclude blacks, Furnco's hiring policies were, in fact, a vehicle for bringing black bricklayers on the job and "resulted in a percentage of Negro bricklayers [13.3 per cent] on the job far in excess of the percentage of Negro bricklayers [5.7 per cent] in the relevant labor market." (C. A. at A20; Conclusions ¶ 4.) As such, after the close of all the evidence, it dismissed all of Respondents' claims and entered judgment for Furnco.

On appeal, the Court of Appeals for the Seventh Circuit upheld the District Court's findings as to five of the Plaintiffs, but, as to three, the appellate court reversed.

As to these three, the Seventh Circuit first found they had established a *prima facie* case of discrimination under *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792, 802 (1973).

The court then went on to find that a refusal to hire at the gate was discriminatory and constituted disparate treatment, even though neither white nor black bricklayers were hired at the gate and the District Court had found such a refusal justified by business necessity. The court held (C. A. at A6-7; 551 F. 2d at 1088-89):

> "It seems to us that there is a reasonable middle ground between immediate hiring decisions on the spot and seeking out employees from among those known to the superintendent. A written application could be taken with in-

quiry as to qualifications and experience. The applicant's claims could be checked and evaluated, and compared with the qualifications and experience of those on the list. The district court seems to have given no consideration to the feasibility to such a method, and we perceive nothing in the record to show that it would not be feasible. The method used, relying on recollections of the brick superintendent and recommendations he accepted from others, was by its nature haphazard, arbitrary, and subjective. 'Such unstandardized and subjective procedures lend themselves to arbitrary and discriminatory hiring.' Reed v. Arlington Hotel Company, Inc., 476 F. 2d 721, 724 (8th Cir. 1973).

"Defendant asserts that its method is not racially discriminatory because a white bricklayer, appearing at the job site in search of work, would fare no better than plaintiffs. The record does not show that white bricklayers did in fact seek work in the same manner as plaintiffs. In any event, the seeming equality of treatment is deceptive. The historical inequality of treatment of black workers seems to us to establish that it is *prima facie* racial discrimination to refuse to consider the qualifications of a black job seeker before hiring from an approved list containing only the names of white bricklayers. How else will qualified black applicants be able to overcome the racial imbalance in a particular craft itself the result of past discrimination?"[10]

Finally, the Court of Appeals flatly refused to consider Furnco's statistical showing that it hired minority bricklayers far in excess of minority representation in the relevant labor market, concluding (C. A. at A8, 9; 551 F. 2d at 1089, 90):

"Where the percentage of minority members in a work force is lower than the group considered, that fact may well indicate the operation of racial discrimination. Absence of such discrimination is not proved by the percentage in the

10. The court did not indicate whether it was referring to pre- or post-Act discrimination.

work force being higher than the percentage in the group considered.

* * * * *

"In dealing with the merits, . . . we have not relied on the racial proportions in the labor force."

The Court of Appeals then remanded the case to the District Court for further proceedings consistent with its opinion.

SUMMARY OF ARGUMENT

This case calls into question Petitioner's hiring system, particularly its refusal to accept applications of bricklayers at the job site. Respondents' claim is, on its face, a claim of systemic discrimination falling under *Griggs* v. *Duke Power Co.*, 401 U. S. 424 (1971), rather than an individual claim under *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792 (1973). To look at it another way, Respondents were rejected for employment (as were all applicants, black or white) not on the basis of individualized determinations, but because Furnco rejected all applicants seeking employment at the job site. Plainly, this is not a disparate treatment case, as that term has been defined by this Court, since it is undisputed that black and white applicants appearing at the job site were treated precisely alike.

The threshold requirement under *Griggs* of demonstrating disparate impact, however, proved to be an insuperable task for Respondents. The evidence in the record conclusively proved that rather than excluding blacks, Furnco's hiring policies, including not hiring at the gate, resulted in the hiring of black bricklayers substantially in excess of their statistical presence in the relevant labor market. Moreover, there was no evidence that Furnco's refusal to hire at the gate had a disparate impact upon black applicants. In short, no *prima facie* case of systemic discrimination was ever established.

The basic error of the court below was its failure to explicitly recognize this as a systemic discrimination case and apply the standards of proof established by *Griggs* and its progeny. This error is curious because, despite its reference to *McDonnell Douglas*, it is clear that the Seventh Circuit considered this case as one involving a claim of systemic discrimination.

Thus, in the appellate court's view, the ultimate question in analyzing Furnco's refusal to hire at the gate was: "How else will qualified black applicants be able to overcome the racial

imbalance in a particular craft, itself the result of past discrimination?" (C. A. at A7; 551 F. 2d at 1089). Concentration upon alleged past discrimination, and remedying its present effects, is plainly a hallmark of this Court's systemic discrimination approach. Similarly, the court below focused on Furnco's system of hiring (not any individual employment decision, but the overall system) and imposed on Furnco its own "feasible" hiring system. Such actions compel the conclusion that the court below viewed this case as one involving systemic discrimination, albeit without any evidence whatsoever of disparate or discriminatory impact.

Rather than analyzing this case under *Griggs*, however, the court below utilized the standards of proof used in individual discrimination (disparate treatment) cases. Not surprisingly, this muddling of *Griggs* and *McDonnell Douglas* led the Court of Appeals down some extraordinary paths.

First, although the District Court had found beyond a reasonable doubt that Furnco's hiring system was legitimate, nondiscriminatory, and justified by business necessity, the appellate court ignored these findings. In the Court of Appeals' view, the subjectivity of the hiring system meant that it was racially discriminatory.

Second, instead of passing on the District Court's findings under the clearly erroneous standard and adhering to the appropriate role of appellate review under *Hazelwood School District* v. *United States*, ____ U. S. ____, 97 S. Ct. 2736 (1977), the Seventh Circuit created *sua sponte* its own hiring system, divorced from both the evidentiary findings made by the District Court and the evidence in the record. In doing so, it imposed on Furnco the burden of demonstrating the absence of alternative hiring systems, a clear departure from the allocations of proof established by this Court. In fact, the hiring system imposed by the Seventh Circuit, under that court's own analysis, is considerably more "arbitrary and haphazard" than that used by Furnco and, most critically, would inhibit, rather than, as did Furnco's, expand the employment of black bricklayers.

Third, the court sought to fragment the hiring system, erroneously focusing upon only one purported aspect of the selection process, rather than the results of the selection process *in toto*. In doing so, it concluded that statistics proving that a larger percentage of black bricklayers were being employed on the job in question than were present in the relevant labor market were irrelevant to the ultimate issue of racial discrimination. The conclusion that statistics are irrelevant in a racial discrimination case is clearly contrary to the holdings of this Court which have repeatedly made plain that statistics serve a vital role in deciding such cases. Indeed, using the methodology approved by this Court in *Castaneda* v. *Partida*, 430 U. S. 482 (1977), the record demonstrates that Furnco's hiring system purposely sought to hire blacks rather than to exclude them.

Finally, in concluding that a cause of action under *McDonnell Douglas* was shown, the court below did so without any finding that Petitioner's actions were racially premised; no racial animus, motive or intent by Furnco was ever proved or found by the court. Such a showing, of course, is mandated by *International Brotherhood of Teamsters* v. *United States*, 431 U. S. 324 (1977). Nor could the Seventh Circuit have made such a finding, since the District Court specifically found that Respondents' rejection was not racially pretextual.

In short, judged by either *Griggs* or *McDonnell Douglas*, Respondents were unable to demonstrate racial discrimination. The Court of Appeals' contrary view raises questions of significance under the civil rights acts regarding what constitutes a "legitimate, nondiscriminatory reason" for failing to hire minority job applicants under *McDonnell Douglas* and the proper roles of district and circuit courts in civil rights cases. It also raises questions relating to the use of statistics in such cases and the requirement of proof of intent or motivation as part of the *prima facie* burden of demonstrating racial discrimination. Such issues, we believe, have been resolved by this Court and others in Petitioner's favor and require reversal of the judgment below.

ARGUMENT.

I.

FURNCO'S HIRING POLICIES WERE LEGITIMATE AND NONDISCRIMINATORY UNDER McDONNELL DOUGLAS.

A. The Burdens of Proof.

It is, of course, well settled that "Respondents, who seek to establish discrimination, have the traditional civil litigation burden of establishing that the acts they complain of constituted discrimination in violation of Title VII." *General Electric Co.* v. *Gilbert*, 429 U. S. 125, 137, n. 14 (1976). An employer need not justify its employment practices called into question until such discrimination has been demonstrated.

There are essentially two methods by which private plaintiffs can demonstrate a *prima facie* case of racial discrimination. The first was set forth by this Court in *Griggs* v. *Duke Power Co.*, 401 U. S. 424 (1971). Under *Griggs*, if it can be demonstrated that an employer's hiring system or job requirements disproportionately exclude blacks either in that black applicants are rejected at a disparately higher percentage than whites or that the hiring standards exclude blacks as a class such that they are disproportionately underrepresented in the employer's work force, then a *Griggs prima facie* case has been established. *See Dothard* v. *Rawlinson*, ____ U. S. ____, 97 S. Ct. 2720, 2726-27 (1977). The employer must then demonstrate the business necessity or job-relatedness of its hiring practices or job requirements. If it meets this burden, the burden then shifts to the plaintiff "to show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest in 'efficient and trustworthy workmanship.' " *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405, 425 (1975).

On its face, this case would appear singularly appropriate for examination under *Griggs*. Respondents' rejection for employment was not the product of any determination as to their individual qualifications, but because Furnco's hiring system rejected all applicants, black and white, who appeared at the gate. At its core, the gravamen of Respondents' case is a claim of systemic racial discrimination.

Under *Griggs*, however, the threshold requirement of disparate impact was never met by Respondents. They were utterly unable to demonstrate that Furnco's hiring policies disproportionately excluded black applicants[11] or that the resulting work force was underrepresented by blacks. Indeed, as found by the District Court (C. A. at A20; Conclusions ¶ 4):

> "There is no showing that these policies had a disproportionate impact or effect on Negroes in any respect. *See e.g., Griggs* v. *Duke Power Co.*, 401 U. S. 424 (1971); *Hester* v. *Southern Railway Co.*, 497 F. 2d 1374 (5th Cir. 1974). On the contrary, Furnco's hiring policies resulted in a percentage of Negro bricklayers on the job far in excess of the percentage of Negro bricklayers in the relevant labor market."

Respondents' case and the Court of Appeals' decision depend instead on the second method of establishing a *prima facie* case of discrimination, disparate treatment as set forth in this Court's decision in *McDonnell Douglas Co.* v. *Green*, 411 U. S. 792 (1973). *McDonnell Douglas* established "the order and allocation of proof in a private, non-class action challenging employ-

11. No evidence was ever adduced before the District Court as to the number of black and white bricklayer applicants attempting to apply at the gate, although the evidence was clear that both blacks and whites appeared at the gate (R. 194, 257). Certainly, Furnco never had such evidence since it is undisputed that its brick superintendent never took the names of any applicant—either black or white—at the gate. Effectively, Furnco's refusal to hire at the gate excluded *all* applicants appearing there, black and white, and so the rejection ratio for blacks and whites is exactly the same.

ment discrimination." 411 U. S. at 800.[12] As stated by this Court, 411 U. S. at 802:

> "The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications."
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> "The burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection."

If the employer's reason for rejecting the applicant suffices to meet the *prima facie* case,[13] the complainant must then demonstrate that the assigned reason for rejection is pretextual and that the underlying reason for rejection was race, 411 U. S. at 804. Assuming, *arguendo*, that the three Respondents found by the Court of Appeals to have been discriminated against met their initial burden, the burden then shifted to Furnco "to articulate some legitimate, nondiscriminatory reason for the employee's rejection."

Furnco justified the rejection of Respondents on two bases: First, it did not hire or take applications from any bricklayers at

12. That plaintiffs in their *prima facie* case under *McDonnell Douglas* must demonstrate intent or motive is discussed, *infra*, in Section IV of the Argument.

13. The difference between "business necessity" under *Griggs* and "legitimate nondiscriminatory reason" under *McDonnell Douglas* has never been articulated by this Court. Both appear to turn on the job-relatedness of the employer's hiring policies, although the former appears to require the employer to meet a more stringent standard than the latter. The difference between the two need not be decided here since the District Court found Furnco's hiring policies passed muster under either standard. Moreover, only a *Griggs*-type case requires a showing of business necessity and, as noted, Respondents never established a *prima facie* case under *Griggs*.

the gate; and second, it only hired fire bricklayers its superintendent knew[14] to be capable, highly competent and experienced, particularly in regard to a blast furnace reline. The District Court found these policies "were racially neutral on their face and were applied equally to both Negro and white bricklayers." (C. A. at A20; Conclusions ¶ 4). Moreover, the District Court found, "The evidence is clear beyond a reasonable doubt that Furnco's hiring policies were justified as a business necessity in that they were necessary for the safe and efficient operation of Furnco's business and were based upon nondiscriminatory, legitimate business reasons." (C. A. at A20-21; Conclusions ¶ 5). Additionally, it found, "Plaintiffs have failed to prove that these policies were racially pretextual or discriminatory in application." (C. A. at A21; Conclusions ¶ 6).

Although disagreeing with the District Court's findings, the Court of Appeals did not articulate how Furnco's hiring policies were either non-legitimate or discriminatory or how they were not job-related. Certainly, the court never said how Furnco's hiring policies were unrelated to efficiency and safety, especially after the District Court found such a nexus.[15] Rather, the apparent vice of Furnco's hiring policies was its subjectivity. As the Seventh Circuit noted (C. A. at A6-A7; 551 F. 2d at 1089):

14. The superintendent acquired such knowledge primarily through his own prior first-hand experience with those hired and secondarily on the basis of recommendations received from individuals on whose judgments he knew he could rely. *See* note 4, *supra*.

15. The court instead came up with its own hiring system which it deemed "feasible." (C. A. at A6; 551 F. 2d at 1089). To say the least, the court's cavalier treatment of the District Court's findings is troublesome in light of the appropriate standard of appellate review, *see* pages 24-26, *infra*. Even more troublesome is the court's unorthodox shifting of the burdens of proof. Thus, the Seventh Circuit appears to require an employer to demonstrate not only that its business practice is legitimate and nondiscriminatory, but also that no other method is acceptable. Effectively, the burden of proof process, as articulated in *Albemarle* and *McDonnell Douglas*, would be turned on its head. *See* pages 30-33, *infra*.

> "The method used, relying on recollections of the brick superintendent and recommendations he accepted from others, was by its nature haphazard, arbitrary, and subjective. 'Such unstandardized and subjective procedures lend themselves to arbitrary and discriminatory hiring.' *Reed* v. *Arlington Hotel Company, Inc.*, 476 F.2d 721, 724 (8th Cir. 1973)."

B. The Subjectivity of Furnco's Hiring Policies Made Them No Less Legitimate and Justified by Business Necessity.

As noted, the Seventh Circuit appears to equate subjective hiring standards with employment discrimination. But, subjective judgments have no talismanic quality in establishing racial discrimination. On the contrary, this Court's decision in *McDonnell Douglas* makes plain that subjective hiring standards, in the absence of discriminatory impact or treatment, are plainly lawful. Indeed, the Seventh Circuit's decision flies in the face of *McDonnell Douglas*, this Court's more recent decision in *Dothard* v. *Rawlinson*, 97 S. Ct. 2720 (1977), and such cases as *Hester* v. *Southern Railway Co.*, 497 F. 2d 1374 (5th Cir. 1974).

Thus, in *McDonnell Douglas*, this Court specifically rejected the Eighth Circuit's dichotomy between subjective and objective criteria in establishing whether an employer's refusal to hire a minority applicant was legitimate and nondiscriminatory. This Court found that such an improper dichotomy "seriously underestimated the rebuttal weight to which petitioner's reasons were entitled." 411 U. S. at 803. So too in *Dothard*, in the absence of any evidence that women prison guards had ever been assaulted by prisoners, 97 S. Ct. at 2734, n. 3, this Court nonetheless upheld Alabama's refusal to allow women to be guards in male maximum security prisons. It did so because of the perceived risk of "a substantial security problem, directly linked to the sex of the prison guard." 97 S. Ct. at 2730.

Similarly, in passing on the use of general intelligence tests and a subjective interview, the Fifth Circuit noted in *Hester* v.

Southern Railway Co., 497 F. 2d 1374, 1381-82 (5th Cir. 1974):

> "Nonetheless, nonvalidated tests and subjective hiring procedures are not violative of Title VII *per se*. Title VII comes into play only when such practices result in discrimination. At that point, the burden of producing evidence shifts to the employer, who must offer satisfactory justification for his procedures.
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> "The missing ingredient in the proof here was the necessary showing of discrimination. Without such proof the district court lacked authority to enjoin the further use of the testing and interviewing procedures by Southern for selection of Data Typists. That injunction is vacated because of this deficiency."

Accord, Roman v. *ESB, Inc.*, 550 F. 2d 1343, 1354 (4th Cir. 1976) (*en banc*) (lack of objective criteria for promotions not discriminatory in absence of evidence of disparate racial impact). As in *Hester* and *Roman*, the missing ingredient in the Seventh Circuit's analysis is any showing that the subjective judgments at issue resulted in discrimination.

Indeed, even the case relied on by the Seventh Circuit, *Reed* v. *Arlington Hotel Co., Inc.*, 476 F. 2d 721 (8th Cir.), *cert. denied*, 414 U. S. 854 (1973), is plainly inapposite. In that case, the statistics introduced by plaintiffs were found by the court to show segregated departments and job classifications. In light of this finding and the fact that department heads decided on their own how to recruit employees in their departments, the unstandardized and subjective procedures were found to lead to discriminatory hiring. In sharp contrast, affirmative hiring of minorities was an integral part of Furnco's hiring procedures utilized in the instant case. And, the statistics herein overwhelmingly show Furnco's policies did not disproportionately exclude blacks.

Even when a *prima facie* case of discriminatory impact or treatment is established, an employer is still entitled to demonstrate the job-relatedness of its hiring procedures. Judged against either the business necessity test of *Griggs* or the legitimate nondiscriminatory reason test of *McDonnell Douglas*, Petitioner's hiring practices were found by the District Court to be proper (C. A. at A20; Conclusions ¶ 5). These hiring policies were first, a refusal to hire bricklayers at the gate and second, only hiring fire bricklayers whom the superintendent knew to be capable, highly competent and experienced, particularly in regard to blast furnace relines.

That Dacies would hire persons he personally knew to be experienced, highly qualified, and who he had confidence would do the work competently, is hardly surprising. It is to be expected that in a job which involves a high degree of skill and which also involves serious risks—both in economic and human terms—if faulty workmanship is performed, the individual responsible for hiring would turn to persons whose competence he is personally aware of either through his own personal knowledge or the recommendations of other superintendents employed by the company.[16] Viewed in light of the exigencies of the job, the hiring of such persons and the attendant refusal to hire at the gate were clearly necessary on the grounds of safety and efficiency. They were manifestly job-related in that they minimized recruiting costs in processing applicants; minimized the loss of the superintendent's time in hiring bricklayers; minimized the risk of incompetently performed work; and minimized the risk that the bricklayers hired lacked the reliability, aptitude, ex-

16. In this regard, the District Court's reliance on *Hodgson* v. *Greyhound Lines, Inc.*, 499 F. 2d 859 (7th Cir. 1974), *cert. denied*, 419 U. S. 1122 (1975), and *Spurlock* v. *United Airlines, Inc.*, 475 F. 2d 216 (10th Cir. 1972), was plainly appropriate. Both *Hodgson* and *Spurlock* involve the right of an employer to make reasonable judgments that the individuals it hires are qualified, especially where the work is specialized and involves potential risk to human lives, precisely the facts here. As the court noted in *Spurlock*, 475 F. 2d at 219:

> "[W]hen the job clearly requires a high degree of skill and the economic and human risk involved in hiring an unqualified applicant are great, the employer bears a correspondingly lighter burden to show that his employment criteria are job-related."

perience and loyalty to timely and properly perform the work. Finally, they maximized Furnco's ability to have the job performed competently with the highest skill level and in a timely manner.

In *McDonnell Douglas*, this Court made plain that reliance on prior experience with an employee was certainly a rational and neutral business justification in a hiring decision. As the Court noted, citing *Garner* v. *Board of Public Works of Los Angeles*, 341 U. S. 716, 720 (1951): "Past conduct may well relate to present fitness; past loyalty may have a reasonable relationship to present and future trust." *McDonnell Douglas*, 441 U. S. at 806, n. 21. Surely, if an employer can rely on a prior unfavorable experience in a hiring decision, reliance on a prior favorable experience is equally a legitimate hiring practice.

So too, in *Nashville Gas Co.* v. *Satty*, ... U. S. ....., 98 S. Ct. 347, 352, n. 5 (1977), decided this Term, the Court noted the economic and efficiency reasons for rehiring known experienced employees:

> "Indeed, petitioner's policy of denying accumulated seniority to employees returning from pregnancy leave might easily conflict with its own economic and efficiency interests. In particular, as a result of petitioner's policy, inexperienced employees are favored over experienced employees; employees who have spent lengthy periods with petitioner and might be expected to be more loyal to the company are displaced by relative new employees . . ."

Similarly, the Seventh Circuit passed on this point in *Waters* v. *Wisconsin Steel Works*, 502 F. 2d 1309 (7th Cir. 1974), *cert. denied*, 425 U. S. 997 (1976). In *Waters*, the employer maintained a policy of filling job openings by recalling former employees, rather than employing new hires. In dismissing the claim of one of the plaintiffs who had not previously been employed by the company, the Seventh Circuit held, 502 F. 2d at 1320:

> "We do not doubt that a policy favoring recall of a former employee with experience even though white before considering a new black applicant without experience comports with the requirements of Title VII and Section 1981. To that end, we do not perceive any discriminatory impact with respect to Samuels who was a new applicant."[17]

Accord, Alexander v. *Aero Lodge No. 735*, ... F. 2d ....., 15 FEP Cases 1413, 1426 (6th Cir. 1977) (policy of retraining and rehiring experienced employees, even though not contractually required to do so and despite adverse impact on blacks, did not violate Title VII).

So, too, in *United States* v. *Local Union No. 3, International Union of Operating Engineers*, 4 FEP Cases 1088 (N. D. Cal. 1972), in modifying a union's referral system because of its discriminatory impact, the court nonetheless upheld a provision in the collective bargaining contract enabling a contractor to recall operating engineers who had previously worked for it. The court held, 4 FEP Cases at 1098:

> "It is not unreasonable, if a contractor wants a particular job done, for him to seek out an operating engineer who has successfully performed that job for him in the recent past. On that basis, the Court refuses to eliminate the provision in the consent preliminary injunction which permits a contractor to call a journeyman specially on that basis."[18]

In this regard, Furnco's refusal to hire at the gate was no less legitimate, no less job-related and was plainly racially neutral. As previously noted, neither black nor white applicants were hired at the gate and as found by the District Court after a

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17. It should be noted that "experience" was referred to by the court as experience with that particular employer, not experience in general.

18. *See also Coopersmith* v. *Roudebush*, 517 F. 2d 818, 823 (D. C. Cir. 1975) ("[I]t appears that the BVA's preference for attorneys with recent legal experience is a valid job-related requirement."); *EEOC* v. *Local 14, International Union of Operating Engineers*, 553 F. 2d 251, 256 (2d Cir. 1977) ("The union was justified in establishing some prerequisites for membership and experience truly is the best teacher."); *Swint* v. *Pullman-Standard*, ... F. Supp. ....., 15 FEP Cases 144 (N. D. Ala. 1977) (consideration of only experienced temporary foremen for positions of salaried supervisor constitutes bona fide occupational qualification).

detailed examination (C. A. at A17-A18; Findings ¶ 14) of the many reasons[19] supporting Furnco's refusal to hire at the gate: "The hiring of bricklayers at the gate would be chaotic and would endanger Furnco's ability to perform its contract with Interlake in a timely, competent and profitable manner." (C. A. at A18; Findings ¶ 14).

In operation then, Furnco's hiring policies treated white applicants precisely as they did black applicants. A white applicant appearing at the gate would fare no better than a black one. Furnco's hiring policies were neutral on their face, were designed to ensure the hiring of the most competent and experienced bricklayers on a job demanding highly skilled workers and speedy performance, and resulted in the hiring of blacks "far in excess of the percentage of Negro bricklayers in the relevant labor market." (C. A. at A20; Conclusions ¶ 4.) Plainly, they were legitimate and nondiscriminatory under *McDonnell Douglas*, as well as justified by business necessity under *Griggs*.

II.

THE COURT OF APPEALS IGNORED THE APPROPRIATE BURDENS OF PROOF AND ROLE OF APPELLATE REVIEW IN A CIVIL RIGHTS CASE.

A. The Seventh Circuit's Standard of De Novo Review.

In reviewing the District Court's findings as to the legitimacy, racial neutrality, job-relatedness, and business necessity of Furnco's hiring practices, the Seventh Circuit applied no recognized standard of review. It chose instead to substitute its own

19. For example, the superintendent normally works 12 to 14 hours a day, seven days a week, and contacts bricklayers he wants to hire in the evenings or on Sundays. It is undisputed that he would not have time to make reference checks of persons applying at the gate (R. 673, 702, 707). Moreover, as will be pointed out in examining the Court of Appeals' "feasible" hiring system, *infra* at pages 26-30, hiring at the gate does not ensure either the competency of the work force or nondiscriminatory selection.

judgment for that of the District Court. In doing so, the Seventh Circuit committed the very same error as did the Eighth Circuit in *Hazelwood School District* v. *United States*, 97 S. Ct. 2736, 2742 (1977). As this Court noted therein, "[T]he Court of Appeals erred in substituting its judgment for that of the District Court . . ."

The appropriate standard for review of the District Court's findings is the "clearly erroneous" standard. *United States* v. *U. S. Gypsum Co.*, 333 U. S. 364, 394 (1948). This standard is clearly applicable to civil rights cases. *See, e.g., Albemarle Paper Co.* v. *Moody*, 422 U. S. 405, 424 (1975); *Washington* v. *Davis*, 426 U. S. 229, 255-56 (1976) (concurring opinion of Justice Stevens). As elaborated in *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U. S. 100, 123 (1969):

> "In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues *de novo*. The authority of an appellate court, when reviewing the findings of a judge as well as those of a jury, is circumscribed by the deference it must give to decisions of the trier of the fact, who is usually in a superior position to appraise and weigh the evidence. The question for the appellate court under Rule 52(a) is not whether it would have made the findings the trial court did, but whether 'on the entire evidence [it] is left with the definite and firm conviction that a mistake has been committed.' " (Citations omitted.)

As we have already noted, the District Court's findings as to the propriety and legitimate business reasons of Furnco not hiring at the gate and instead contacting bricklayers known by its superintendent, either personally or through the recommendations of primarily another superintendent, are amply supported by the evidence. In reversing the District Court, the Seventh Circuit passed over these unambiguous findings as follows (C. A. at A6-A7; 551 F. 2d at 1088-89):

> "It seems to us that there is a reasonable middle ground between immediate hiring decisions on the spot and seek-

ing out employees from among those known to the superintendent. A written application could be taken, with inquiry as to qualifications and experience. The applicant's claims could be checked and evaluated, and compared with the qualifications and experience of those on the list. The district court seems to have given no consideration to the feasibility of such a method,[20] and we perceive nothing in the record to show that it would not be feasible. The method used, relying on recollections of the brick superintendent and recommendations he accepted from others, was by its nature haphazard, arbitrary, and subjective. 'Such unstandardized and subjective procedures lend themselves to arbitrary and discriminatory hiring.' *Reed* v. *Arlington Hotel Company, Inc.*, 476 F. 2d 721, 724 (8th Cir. 1973)."

The Seventh Circuit's substitution of its judgment for that of the District Court clearly flies in the face of this Court's decision in *Hazelwood* as to the appropriate fact-finding roles of district and circuit courts. *See also, Dothard* v. *Rawlinson*, 97 S. Ct. 2720, 2730-32 (1977) (concurring opinion of Justice Rehnquist). Moreover, the *sua sponte* hiring system it seeks to impose on Furnco, objectively viewed and judged against its own standards, is fatally defective.

B. The Impact of the Appellate Court's "Feasible" Hiring Scheme.

1. Haphazardous, Arbitrariness, and Subjectivity.

The vice of the Seventh Circuit labelling the system used—the first-hand experience of the brick superintendent with bricklayers on other jobs and recommendations from others[21]—

20. Contrary to the Seventh Circuit's opinion, the District Court specifically found written applications to be an impractical method of hiring in the context of the job in question. (C. A. at A16; Findings ¶ 13).

21. One wonders what better evidence there is as to a bricklayer's ability to perform the work than the first-hand observation of the superintendent. Certainly, the fact that the superintendent knew that the bricklayers he was hiring had performed work for him on

(Footnote continued on next page.)

as being "haphazard, arbitrary, and subjective" is underscored when it is recognized that the system found "feasible" by the Seventh Circuit is no less infirm. Carefully considered, the Seventh Circuit, in rejecting the District Court's findings, apparently seeks to trade one set of supposedly arbitrary, haphazard and subjective judgments for another. And, putting to one side that there was no evidence before the District Court that such a system would work, let alone accomplish the relining of a blast furnace competently and quickly, the apparent racial impact of the system found "feasible" by the District Court would be the hiring of fewer blacks.

For example, the Seventh Circuit indicated that once an application was received, "The applicant's claims could be checked and evaluated and compared with the qualifications and experience of those on the list."[22] (C. A. at A6; 551 F. 2d at 1088-89). This, however, would mean that the superintendent would have to call up other contractors and superintendents and ask for references, *i.e.*, rely on "recommendations he accepted from others," precisely what the Seventh Circuit found to be "haphazard, arbitrary and subjective."

Moreover, how are the judgments of such other contractors and superintendents any less subjective, haphazard and arbitrary than Furnco's superintendent's own first-hand knowledge? Indeed, such a reference system is even more fraught with discrimination and haphazardness because Furnco's superintendent has no way of evaluating either the knowledge of the person making

(Footnote continued from preceding page.)

blast furnace relines previously and were qualified and competent to do such work is the best evidence that the selection process was manifestly job-related. In this regard there was, of course, no evidence in the record that the persons hired by Dacies, based upon his experience with them, were other than highly qualified and competent in the work involved.

22. The "list" referred to by the Seventh Circuit is the alleged list used by Dacies purportedly "containing only the names of white bricklayers." The question of the existence of such a list and what, if any, role it played in the hiring of bricklayers on this job are discussed *infra* at pages 33-35.

the reference and/or whether or not that person's judgment is tainted by racial prejudice.[23] Would a poor reference—even though racially motivated—provide a complete defense if Furnco refused to hire a black bricklayer? And, how is the superintendent to evaluate the judgment of others—who may be entire strangers to him—against his own personal knowledge that bricklayers he could hire, indeed wants to hire, would competently do the work? Surely the natural choice of the superintendent would be to hire the bricklayers he *knew* could perform the work over someone recommended by a stranger.

What is also particularly curious about the Seventh Circuit's holding is the tension inherent between its assumption that any racial imbalance in the bricklaying industry is itself the result of past discrimination (C. A. at A7; 551 F. 2d at 1089) and its holding as to both what was "feasible" and apparently legal in terms of hiring. If, in fact, there is past discrimination in a particular craft, then would not any references given out be particularly suspect? Yet, the Court of Appeals seemingly approves the use of references and the subjective judgments of those giving them in the context of this industry and the circumstances of this case, while labelling Furnco's superintendent's own first-hand judgments arbitrary. How the former is fair and the latter arbitrary is hard to fathom.

2. Racial Impact.

Significantly, the racial impact of the hiring system found "feasible" by the Court of Appeals was never demonstrated. Indeed, this alternative hiring system appears to present fewer, not more, job opportunities for blacks.

Certainly, if Furnco was required to take the names of black bricklayers at the gate it would also be required to take the names of white bricklayers. *See McDonald* v. *Santa Fe Trail*

23. The EEOC has, in fact, found such a reference system to be racially discriminatory because of the potential racial influence in such references. *See* EEOC Dec. No. 72-2103, 4 FEP Cases 1169 (1972); EEOC Dec. No. 72-0947, 4 FEP Cases 1305 (1972).

Transportation Co., 427 U. S. 273 (1976). Such a system of hiring at the gate, of course, with the attendant problems of word-of-mouth referrals, has often been struck down precisely because it tended to exclude blacks. *See, e.g., Parham* v. *Southwestern Bell Telephone Co.*, 433 F. 2d 421 (8th Cir. 1970); *Clark* v. *American Marine Corp.*, 304 F. Supp. 603, 606 (E. D. La. 1969). *See also, United States* v. *Georgia Power Co.*, 474 F. 2d 906 (5th Cir. 1973).[24] Moreover, federal regulations from the Office of Federal Contract Compliance Programs (OFCCP) specifically provide that a policy of hiring at the gate runs grave risks of discrimination.[25]

If the qualifications of black and white applicants at the gate would have to be compared against those of bricklayers known to be competent and experienced, there was certainly no showing that such a system would have led to, as Furnco's did, the hiring of black bricklayers in excess of their statistical presence in the relevant labor market. Indeed, assuming a totally random and nondiscriminatory selection process, blacks would have worked only 5.7 per cent of the job instead of the 13.3 per cent they actually worked. In essence, there was never any showing

24. The risk of discrimination in hiring at the gate involves risks in the selection process, *i.e.*, who should be hired at the gate, as well as risks that word-of-mouth recruiting would lead to an exclusively white work force. In this regard, it should be noted that Furnco, to avoid such risks, purposely sought out and recruited black bricklayers in order to ensure a substantially significant black representation within its work force.

25. These regulations provide:

> "Contractors should employ procedures for handling of applicants that are compatible with equal employment opportunity. In this regard employee referrals or 'walk-ins' require particular attention since these recruitment procedures are most susceptible to discrimination. Employees tend to refer friends from their own racial and ethnic backgrounds and of their own sex and, therefore, if few minority group and women workers are already employed, few minority group and women applicants are likely to be referred. With regard to 'walk-ins,' the entire recruitment program is strongly dependent upon the attitudes of guards and receptionists and can thus be easily frustrated." 41 C. F. R. § 5A-12.805-51(b)(5) (1976).

that refusing to hire at the gate benefited whites more than blacks; as noted, statistically, the contrary is true.

Moreover, it should be underscored that if Furnco had, in fact, both relied on a list containing only the names of white bricklayers—as it is accused of—and hired at the gate by checking references—as required by the Court of Appeals—the result would have been the hiring of fewer blacks, not more. For example, if Furnco had accepted applications at the gate, Respondent Sylvester Williams would not have gotten a job, as he did, because, as found by the District Court and upheld by the Court of Appeals, he never even applied for a job (C. A. at A4; 551 F. 2d at 1087). Whether Respondents Nemhard and Hawkins would have gotten jobs is extraordinarily doubtful.[26] Certainly, there was no evidence that other black bricklayers employed on the job—Joseph Alston, Theodore Alston, James Branch, David Cannon, Raymond Pendarvis or Percy Wilson—ever applied at the gate or anywhere else for that matter. In short, the racial impact of the system suggested by the Court would be that fewer blacks would have been hired.

3. Turning Albemarle and McDonnell Douglas Upside Down.

Finally, the Seventh Circuit opinion, by requiring the employer to demonstrate the non-feasibility of alternative hiring systems, constitutes a clear misallocation of the established burden of proof. *Albemarle* makes plain that the party challenging a hiring system proven to be job-related bears the burden of showing alternative hiring methods:

> "[I]t remains open to the complaining party to show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest in 'efficient and trustworthy workmanship.'" 422 U. S. at 425.

Similarly, *McDonnell Douglas* requires that once the employer has demonstrated the legitimate and nondiscriminatory basis

26. Hawkins admitted, "I haven't had very much experience in firebrick," (R. 477) and Nemhard testified that he never performed work on a blast furnace reline (R. 146).

for its hiring decision rejecting the applicant, the burden is on the complaining party to demonstrate the pretextual nature of the rejection. 411 U. S. at 804.

But Respondents never demonstrated either the pretextual nature of Furnco's hiring system or that any other selection system would serve Furnco's interests and have a lesser racial impact. In this respect, the District Court specifically found that Furnco's hiring system was not a pretext, was justified by business necessity, and rather than having any invidious racial impact, was clearly designed to hire a larger percentage of black bricklayers than existed in the relevant labor market.

At no time did Respondents ever meet their burden under *Albemarle* and *McDonnell Douglas*. Indeed, there was no evidence demonstrating the feasibility of the Seventh Circuit's hiring system. On the contrary, every single witness with any experience as a mason contractor acknowledged that he would have utilized Furnco's hiring system, not the Seventh Circuit's. Thus, Furnco's expert witnesses—Wright and Dacies—both testified as to the legitimacy and business necessity of Furnco's hiring policies. Respondent Nemhard, a former contractor, concurred. Thus, he testified (R. 128-29):

> "Q. [By Mr. Kaplan] Mr. Nemhard, if you were a contractor, as you were in New York . . . and you were building a blast furnace . . . wouldn't you want to hire the most experienced people you knew of?
>
> "A. [By Mr. Nemhard] The answer is yes.
>
> "Q. [A]nd . . . if you knew of experienced people, you would go out and seek them and try to hire them, is that correct?
>
> "A. Yes.
>
> "Q. And if you had a choice between someone who had worked with you before or someone who was a stranger, you would pick the person you knew, you had worked with before, is that correct?
>
> * * * * *
>
> "A. Yes, if that person was available."

Finally, there was the testimony of Respondents' first witness, Nicholas Popovic. Popovic was president of a local bricklayers union and had been in the industry—as bricklayer, brick superintendent, union business agent and union president—for 50 years (R. 25). It was stipulated that Popovic was "extraordinarily knowledgeable about the bricklaying industry." (R. 26). On direct, Popovic testified that contractors "will always call a man that has worked for them if he satisfied them previously" (R. 35) and that as a mason contractor "usually you try to get ahold of the people that worked for you." (R. 36). Popovic further testified on direct that hiring at the gate was not the customary practice in the industry.[27] He stated, "In my experience, I never took anyone's name or address [at the gate]." (R. 37).

On cross, Popovic testified that when he served as a brick superintendent on a blast furnace reline, he would seek out bricklayers "that had worked for me and satisfied me in their services." (R. 47). And, he reiterated that he never hired or took applications at the gate (R. 49). Thus, Respondents' own expert witness testified he would have used Furnco's hiring system. Not surprisingly, the District Court found "the evidence is clear beyond a reasonable doubt that Furnco's hiring policies were justified as a business necessity in that they were necessary for the operation of Furnco's business and were based upon nondiscriminatory legitimate business reasons." (C. A. at A21; Conclusions ¶ 5.)

How the Court of Appeals discerned that its hiring system was "feasible" on the record before it, or how it could, on the same record, ignore the District Court's findings as to the legitimacy and business justifications of Furnco's hiring system, is difficult to understand. Notably, if a blast furnace has ever been relined in a competent and timely manner anywhere or any time using the appellate court's system, the record is totally devoid of such evidence.

27. Popovic testified that a contractor would hire at the gate only if bricklayers who had previously worked for him were unavailable (R. 36-38). Practically all the Respondents testified that once having worked for an employer, they would be contacted for work without ever having to go to the gate. *See* note 6, *supra*.

Clearly, the teachings of this Court are that a Court of Appeals cannot, unrestrained by either the evidence before the District Court or its findings, impose novel hiring schemes of its own devise upon employers. Certainly, the civil rights acts, under the guise of appellate review, do not sanction such an approach.

III.

THE SEVENTH CIRCUIT'S REFUSAL TO CONSIDER STATISTICAL EVIDENCE CONFLICTS WITH DECISIONS OF THIS COURT.

A. The Seventh Circuit's Restrictive View of Furnco's Hiring Policies.

The Court of Appeals held that statistical evidence of the racial impact of Furnco's hiring system was irrelevant to the issue of discrimination. In trying to understand this startling conclusion, it is necessary to understand the court's restrictive and erroneous view of the evidence.

Taken in tandem, the Seventh Circuit found Furnco's policies of refusing to hire at the gate and hiring persons known to its superintendent to be experienced and competent in the work to constitute racial discrimination because of the purported presence of a list "containing only the names of white bricklayers" from which Dacies hired. Thus, the Court held (C. A. at A7; 551 F. 2d at 1089):

> ". . . In any event, the seeming equality of treatment is deceptive. The historical inequality of treatment of black workers seems to us to establish that it is *prima facie* racial discrimination to refuse to consider the qualifications of a black job seeker before hiring from an approved list containing only the names of white bricklayers. How else will qualified black applicants be able to overcome the racial

imbalance in a particular craft, itself the result of past discrimination?"[28]

One of the great fictions that Respondents have attempted to create and that the Seventh Circuit appears to have accepted is that there was such a list. For example, the court never explains how, if such a list was used, black bricklayers were hired on the job in a percentage in excess of the percentage of black bricklayers in the relevant labor market. In fact, the pool of persons who, prior to the job, were considered by Dacies to be hired and who were hired consisted of both black and white bricklayers. The evidence shows unmistakably that Dacies had the names of black bricklayers *prior* to the start of the job[29] and that blacks were hired from the outset and throughout the job.[30]

The undisputed fact is that at the time the job started, there was a pool of bricklayers both black and white, whom Dacies considered for the job. If there were more whites than blacks in the pool, this reflected the undisputable fact that there are more white bricklayers than black. Significantly, however, the result of using this pool was that the number of blacks hired far

28. In discussing the historical inequality of treatment of black workers, the court nowhere distinguishes between pre-Act or post-Act discrimination. *Cf. International Brotherhood of Teamsters* v. *United States*, 431 U. S. 324 (1977); *Hazelwood School District* v. *United States*, 97 S. Ct. 2736 (1977). Moreover, the court ignores the fact that although the qualifications of several blacks were never compared with bricklayers on the job, neither were the qualifications of every single white bricklayer who did not get a job.

29. *See* note 8, *supra*. Dacies testified that he has "various notes" containing the names and phone numbers of bricklayers which he has kept "because they were good mechanics." (R. 769.) To be sure, the names contained on such notes were of white bricklayers; however, prior to the Interlake job, Dacies also obtained the names and phone numbers of black bricklayers.

30. For example, only 1.7% of the man-days worked on the job elapsed before the first black bricklayer was hired (Def. Ex. 22; R. 621-22) and of the 12 non-supervisory bricklayers working the longest on the job, three (David Cannon, Joseph Alston and R. D. Jones) were black (Jt. Ex. 2; R. 451).

exceeded the number that would have been hired if they were selected on a random basis.[31]

By looking at only one part of the hiring process—the so-called "list"—in basing its finding of discrimination, without considering the entire hiring process and its results, the Seventh Circuit's decision conflicts with numerous court decisions and with prevailing civil rights law.

For example, in *Smith* v. *Troyan*, 520 F. 2d 492 (6th Cir. 1975), *cert. denied*, 426 U. S. 934 (1976), the complainants alleged that the use of a test by the Police Department of the City of East Cleveland was discriminatory under Title VII. The evidence showed that the test had a disparate impact on black applicants; however, the test was only one part of the hiring process. The evidence showed that considered as a whole, the hiring process of the police department did not have a disparate impact on blacks. In overturning the district court's invalidation of the test because the total examination process was not discriminatory, the Sixth Circuit held, 520 F. 2d at 498:

> "That blacks fare less well than whites on the AGCT, a 'subtest' in the process of hiring East Cleveland police officers, is insufficient in itself to require defendants to justify the AGCT as being job-related. Carried to its logical extreme, such a criterion would require the elimination of individual questions marked by poorer performance by a racial group, on the ground that such a question was a 'subtest' of the 'subtest.'"

Similarly, in *Kirkland* v. *New York State Department of Correctional Services*, 374 F. Supp. 1361 (S. D. N. Y. 1974), *aff'd in relevant part*, 520 F. 2d 420, 425, *pet. for reh. denied*, 531 F. 2d 5 (2d Cir. 1975), *cert. denied*, 429 U. S. 823 (1976), defendants sought to justify an examination procedure, which, as a whole, had a disparate impact on blacks and Hispanics, by

31. The Court of Appeals appeared to find suspicious the fact that, "Most of the jobs (approximately 84-87%) were foreordained to be filled by white bricklayers." (C. A. at A8; 551 F. 2d at 1089). The court totally ignores the fact that if there had been a random selection, 95 per cent of the jobs would have been given to whites.

attempting to fragment the examination process. In rejecting this approach, the court held, 374 F. Supp. 1370:

> "It is unnecessary to detail the permutations sub-test by sub-test and facility by facility, since the suggested approach itself is invalid as a matter of law. The cases indicate that a showing that the overall examination procedure produced disparate results cannot be rebutted by fragmenting the process and demonstrating that separately the parts did not differentiate along racial or cultural lines. In *Chance*, for example, the fact that minority candidates had a higher passing rate than White candidates on seven out of fifty examinations did not vitiate plaintiffs' proof that the series of examinations as a whole discriminated against them and their class. 330 F. Supp. at 211; *see also Guardians*, 354 F. Supp. at 786. In *Vulcan*, the very question whether a single examination procedure can properly be subdivided and the parts considered separately, was raised and Judge Weinfeld rejected the proposition:
>
> > 'Moreover, the examination may not be truncated; whether or not it has an adverse discriminatory impact upon minority groups should be considered in terms of the total examination procedure. Here there can be no doubt, whatever the relative impact of component parts, that in end result there was a significant and substantial discriminatory impact upon minorities. . . .' 360 F. Supp. at 1272.
>
> "Any other approach conflicts with the dictates of common sense. Achieving at least a passing score on the examination in its entirety determines eligibility for appointment, regardless of performance on individual sub-tests. Accordingly, plaintiffs' case stands or falls on comparative passing rates alone. Thus, in law and in logic, we find defendants' approach unwarranted."

Similarly, in *Swint* v. *Pullman-Standard*,[32] 539 F. 2d 77 (5th Cir. 1976), in determining the issue of whether there had been

32. *See also, Taylor* v. *Safeway Stores, Inc.*, 524 F. 2d 263, 271-72 (10th Cir. 1975) (reliance on employee referral system was nondiscriminatory where effect of total hiring practices resulted in no disparate hiring of blacks); *Roman* v. *ESB, Inc.*, 550 F. 2d 1343,

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racially discriminatory departmental assignments, the court of appeals overturned the district court's analysis which focused on the racial balance of individual departments. In reversing, the Fifth Circuit held, 539 F. 2d at 94:

> ". . . The appropriate evidentiary examination should focus on the *plant as a whole* to determine whether there have been racially discriminatory assignments.[40] (Emphasis in original.)

* * * * *

"40. In rejecting the limitation of the scope of the court's examination to the statistical imbalance of nine departments, we likewise reject the notion that a Title VII prima facie case of discrimination could be shown merely by proving that some departments in a plant do not approximate the racial makeup of the plant."

The manifest error of the Court of Appeals in focusing solely on the purported "list" without an examination of the total hiring process is clearly demonstrated by reference to the proposed "Uniform Guidelines on Employee Selection Procedures," 42 Fed. Reg. 65542 (Dec. 30, 1977), issued by the four agencies of the federal government—EEOC, Civil Service Commission, Department of Justice and Department of Labor (OFCCP)—principally concerned with the enforcement of civil rights laws. Thus, the proposed guidelines make unmistakably clear that a hiring procedure cannot be parsed into its various subparts, but has to be examined as a whole to determine whether

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1350-53 (4th Cir. 1976) (cannot isolate statistical information in regard to hiring during three month period; must look at overall hiring figures); *Patterson* v. *Western Development Laboratories*, ... F. Supp. ....., 13 FEP Cases 772 (N. D. Cal. 1976) (statistics as to applicants applying in "person" irrelevant without looking at statistics relating to applicants applying by "mail" as well). *Cf. General Electric Co.* v. *Gilbert*, 429 U. S. 125 (1976) (must consider overall selection of risks covered by insurance plan to determine if exclusion of pregnancy was gender-based discrimination); *Nashville Gas Co.* v. *Satty*, 98 S. Ct. 347 (1977).

or not it discriminates against protected groups. Thus § 4C of the Guidelines[33] provide, 42 Fed. Reg. at 65544:

> "C. If the . . . total selection process for a job has no adverse impact, the federal enforcement agencies will not expect a user to evaluate the individual components for adverse impact, or to validate such individual components, and generally will not take enforcement action based upon adverse impact of any component of that process, including the separate parts of a multi part selection procedure or any separate procedure that is used as an alternative method of selection."

The Guidelines further provide that in the absence of applicant flow data, a comparison may be made between the employer's work force and the minority group's representation in the relevant labor market. § 4D, 42 Fed. Reg. at 65544.

There is, of course, no evidence in this case that the total selection procedure used by Furnco had an adverse impact on black applicants. And, in regard to the question of underrepresentation, the evidence plainly shows, as found by the District Court, that "Furnco's hiring policies resulted in a percentage of Negro bricklayers on the job far in excess of the percentage of Negro blicklayers in the relevant labor market." (C. A. at A20; Conclusions ¶ 4.)

The error of the Court of Appeals' ignoring Furnco's statistics and the effect of its overall hiring system is plain and will be dealt with in detail momentarily. However, one final point should be made. In looking at this purported "list" and Furnco's refusal to consider applicants at the gate, the Court of Appeals asks: How else will qualified blacks be hired? The answer is that Furnco went out and actively recruited and hired qualified black bricklayers to perform the work, the result being the employment on this job of a significantly higher percentage of

33. It should be noted that this section of the proposed Guidelines for all four agencies is currently in use by three of them, the OFCCP, Civil Service Commission and Department of Justice. *See* 41 C. F. R. §§ 60-3.2, 60-3.4(b).

minority bricklayers than are contained in the relevant labor market. There is considerable tension between the court's concern that qualified black bricklayers be hired and its refusal to consider the fact that this is precisely what Furnco did. Indeed, it is ironic that an employer which purposely seeks to integrate its work force is barred from relying upon statistics showing precisely this and demonstrating its wholehearted compliance with the civil rights laws.

B. The Relevance of Statistics.

The Court of Appeals held that the use of statistics in an employment discrimination case is a one-way street; that statistics can prove discrimination, but cannot disprove it. Indeed, the court flatly ruled that statistics have no probative force regarding the absence of discrimination. Thus, the Seventh Circuit stated (C. A. at A8, A9; 551 F. 2d at 1089, 1090):

> "Where the percentage of minority members in a workforce is lower than the group considered, that fact may well indicate the operation of racial discrimination. Absence of such discrimination is not proved by the percentage in the workforce being higher than the percentage in the group considered."
>
> * * * * *
>
> "In dealing with the merits, . . . we have not relied on the racial proportions in the labor force."

In looking at only part of the selection process, it is little wonder that the Seventh Circuit totally ignored the statistical evidence here. A look at that evidence, however, tells a far different story. It compels reaching a wholly different conclusion than that of the Seventh Circuit's.

At the outset, it is important to note that the appellate court's rejection of the probative value of statistics is clearly out of the mainstream of decisions of this Court. As this Court noted in *International Brotherhood of Teamsters* v. *United States*, 431 U. S. 324, 339 (1977), "[O]ur cases make it unmistakably

clear that '[s]tatistical analyses have served and will continue to serve an important role' in cases in which the existence of discrimination is a disputed issue."

Similarly, it is out of step with decisions of other courts of appeals. Thus, as the Fifth Circuit stated in *Alabama* v. *United States*, 304 F. 2d 583, 586 (5th Cir. 1962), *aff'd per curiam*, 371 U. S. 37 (1963): "In the problem of racial discrimination statistics often tell much and Courts listen." *Accord, Parham* v. *Southwestern Bell Telephone Co.*, 433 F. 2d 421 (8th Cir. 1970); *Jones* v. *Lee Way Motor Freight, Inc.*, 431 F. 2d 245 (10th Cir. 1970), *cert. denied*, 401 U. S. 954 (1971); *Green* v. *McDonnell Douglas Corp.*, 528 F. 2d 1102, 1105 (8th Cir. 1976).

At trial, Furnco introduced into evidence the Office of Federal Contract Compliance Program's "Chicago Plan," 41 C. F. R. 60-11 (Def. Ex. 21; R. 618, 620).[34] The statistical evidence contained in there was based upon public hearings in the Fall of 1969, as well as supplemental information obtained by the OFCCP. The "Chicago Plan" itself was implemented in late 1973. The Interlake job, of course, was performed during this period, in the Fall of 1971. The statistics for this period indicate:

> "The most current and reliable data developed at the hearings and otherwise obtained by investigation and government statistical analysis reveal the following as the current minority representation in various construction trade unions in the Chicago area. . . . Bricklayers—5.7%." 41 C. F. R. at 60-11.11(d).[35]

34. The "Chicago Plan" was promulgated under Executive Order 11246, 30 Fed. Reg. 12319, and is administered by the OFCCP.

35. As determined by the OFCCP, the relevant labor market for construction workers in the Chicago area is the Chicago Standard Metropolitan Statistical Area (SMSA). This Court has upheld the relevance of the Chicago SMSA in a parallel context of racial discrimination.

Thus, in *Hills* v. *Gautreaux*, 425 U. S. 284 (1976), this Court approved a Chicago SMSA-wide remedial order against HUD for its

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As found by the District Court, "From late 1969 through late 1973, the time period encompassing the Interlake job, 5.7 percent of the bricklayers in the relevant labor force were minority group members." (C. A. at A16; Findings ¶ 12.) Such a determination as to the relevant labor force is clearly a question for the trier of fact. *Hazelwood School District* v. *United States*, 97 S. Ct. 2736, 2744 (1977). Moreover, the Court of Appeals made no finding that the District Court's conclusion was clearly erroneous. In sharp contrast, the District Court found, "Plaintiffs offered no other admissibly relevant statistics, nor did they present any evidence tending to rebut the validity of the [Defendant's] statistics." (C. A. at A16; Findings ¶ 12.)

At trial, Respondents introduced statistics, rejected by the District Court,[36] which purported to show that out of approxi-

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involvement in housing discrimination in the city of Chicago. It held that the housing market in Chicago "is coterminous" with the SMSA, 425 U. S. at 299, n. 15. And, it recognized, 425 U. S. at 299:

> "The relevant geographic area for purposes of the respondents' housing options is the Chicago housing market, not the Chicago city limits."

So too, the relevant labor market for bricklayers on a job performed in the city of Chicago is the Chicago SMSA.

36. Respondents' statistical submission consisted of a study made in 1973, two years after the Interlake job, offering to show the racial composition of Bricklayers Union Local 21, the jurisdiction of which is only Cook County. The study was based on information gathered by clerks who attempted to assign a racial classification to individual union members on the basis of unspecified knowledge of names and addresses (R. 44). To this, District Court Judge Richard Austin responded, "I just had a black Richard Austin before me last week. If you are going to do it on the basis of names, I don't think it is a very helpful way to make a determination." (R. 44.) Additionally, Respondents admitted that there are bricklayers who are not members of the Local seeking jobs in Chicago (R. 45). Finally, as testified to by the Local Union President, on any given job, the union seeks that only approximately 50% of the jobs be given to its members (R. 40-41). The Court of Appeals found the exclusion of Respondents' statistics to be "an abuse of discretion," but in light of the fact that such statistics did not prove anything, it found the exclusion "would not be prejudicial." (C. A. at A9; 551 F. 2d at 1090.)

mately 3800 members in a local bricklayer's union there were somewhere between 510 and 530 black bricklayers (R. 44), between 13.4%-13.7%. Viewed in any number of ways, at the very least, Respondents' figures evidence a complete absence of discrimination here. Viewed in light of the statistics found appropriate by the District Court, the statistical evidence demonstrates that Furnco made significant and successful efforts to hire blacks, not to discriminate against them.[37]

The relevance of such statistics to this case cannot be seriously doubted. This was underscored by this Court's recent decision in *Hazelwood School District* v. *United States*, 97 S. Ct. 2736 (1977). In *Hazelwood*, as here, subjective hiring practices were alleged to result in the disparate hiring of minority applicants in a job with high skill requirements. This Court concluded that (1) a statistical comparison between the minority representation in the skilled labor force capable of performing the work in question and the minority representation in the employer's work force is clearly probative of whether the employer has engaged in employment discrimination in hiring; and (2) it is for the trial court to select the appropriate relevant labor market for such an analysis.

The significance of the statistics found by the District Court to the case herein cannot be so easily dismissed as the Seventh Circuit has done. This is fully demonstrated by this Court's reference in *Hazelwood* to the statistical analysis set forth in *Castaneda* v. *Partida*, 430 U. S. 482, 496-97, n. 17 (1977), as "measuring the significance of . . . statistical disparities."

Indeed, applying the methodology of *Castaneda* to the facts herein—using the standard deviation and expected value of the binomial distribution as a comparative test to the actual proportion of black bricklayers employed on the job—underscores that Furnco's hiring practices, instead of excluding blacks, had precisely the opposite effect.

37. Thus, Furnco's statistics substantiates its testimony at trial that Furnco's affirmative action program was designed to bring black bricklayers on the job.

Thus, a comparison of the percentage of man-days worked by black bricklayers (13.3%) and the expected percentage of black bricklayers employed based upon their presence in the relevant labor force (5.7%) demonstrates that the actual number of black bricklayers employed was nearly 14 standard deviations *greater* than the expected statistical number.[38] Statistically, only one conclusion can be drawn: Furnco purposely hired Negroes, rather than excluding them.[39]

In fact, using the figures most favorable to the Respondents, the statistical disparity between their proposed labor market (13.7% black bricklayers) and the percentage of man-days worked on the job by black bricklayers (13.3%) is less than one-half of the standard deviation of the number of blacks who statistically should be expected to be in the work force[40] and is well within the permissible range of two or three standard deviations suggested by the Court in *Hazelwood*, 97 S. Ct. at 2742, n. 14.

An equally compelling analysis is that of looking at the man-days worked by non-discharged, non-supervisory bricklayers.[41]

38. Using the *Castaneda* methodology, the measure of the fluctuations from the expected value is the standard deviation, defined for the binomial distribution as the square root of the product of the total number in the sample (here 1819 man-days) times the probability of selecting a Negro bricklayer (.057) times the product of selecting a non-Negro bricklayer (.943). The standard deviation derived is 9.89. The difference between the expected value (103.7) and the observed number (242) equals 138.3 or 13.98 standard deviations.

39. For example, this Court noted in *Castaneda* that a difference of 12 standard deviations between actual results and expected values would occur by chance less than one out of every 10^{25} times. 430 U. S. at 497, n. 17.

40. Since 1819 total man-days were worked on the job and using Respondents' figures that 13.7% of the labor market was comprised of black bricklayers, the expected number of man-days worked by black bricklayers would be approximately 249 (1819 times .137). The standard deviation is 14.67. Since 242 of the man-days were worked by black bricklayers, this constitutes less than one-half of one standard deviation.

41. This analysis looks at the qualified non-supervisory bricklayers employed on the job, *i.e.*, the jobs Respondents claim they

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There were 1590 such man-days, of which blacks worked 228 (14.3%). Using Respondents' figures, it is clear that blacks were not underrepresented. Using the District Court's figures, the results are that black man-days worked are nearly 15 standard deviations *greater* than the expected number.[42]

One final point should be made. The Court of Appeals claims "White bricklayers also tended to be employed earlier and therefore obtained the longer lasting and more profitable jobs." (C. A. at A8; 551 F. 2d at 1089). Statistically, this is utter nonsense. For example, excluding all discharges and supervisors, *see* note 41, *supra*, blacks worked an average of 32.5 days and whites worked an average of 34.05 days. Any difference is statistically insignificant since the average number of days worked by blacks was within one-half a standard deviation of the average number of days worked by whites.[43]

In sum, the statistics herein tell a wholly different story than that portrayed by the Court of Appeals. This is hardly surprising since the Court of Appeals erroneously ignored the total selection process and the resulting statistics, just as it totally ignored

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were deprived of because of racial discrimination. There were four supervisors on the job—three whites and one black. Respondents have never alleged that they were qualified to be supervisors or that they were discriminated against in not being made supervisors. Additionally, four bricklayers—one white and three blacks—were discharged on the job. None was ever found to have been improperly discharged. Two of the blacks claimed racial discrimination but the District Court found it "clear beyond a reasonable doubt that [they] were discharged on the job for just cause due to poor work performance." (C. A. at A22; Conclusions ¶ 9.) The Court of Appeals affirmed these findings (C. A. at A5; 551 F. 2d at 1088).

42. The expected number is 90.63 (1590 × .057). The standard deviation is 9.24. The actual number (228) exceeds the expected (90.63) by 14.86 standard deviations.

43. Thus, there were 1590 man-days worked by 47 bricklayers (seven blacks and 40 whites). Blacks constituted 14.9% of the relevant work force (seven of 47) and worked 14.3% of such man-days (228 of 1590). The expected number of man-days worked by blacks is 236.9. The standard deviation is 14.2 and the difference between the expected (236.9) and the actual (228) is approximately one-half a standard deviation.

the legitimate nondiscriminatory business reasons justifying Furnco's hiring practices.

IV.

DISCRIMINATORY INTENT OR MOTIVE ARE ESSENTIAL ELEMENTS OF A CLAIM UNDER McDONNELL DOUGLAS.

The Court of Appeals, of course, found that discrimination occurred under this Court's decision in *McDonnell Douglas*. It did so, however, without any finding of discriminatory intent or motive. Instead, it found that Furnco's refusal to hire at the gate—applied equally to blacks and whites—somehow constituted disparate treatment.

But, this Court made plain in *International Brotherhood of Teamsters* v. *United States*, 431 U. S. 324 (1977), that such intent or motive is a necessary element of proof in an employment discrimination case alleging disparate treatment. Setting forth the dichotomy between the proof essential to an allegation of disparate treatment from that proof essential to a charge of disparate impact, this Court explained, 431 U. S. at 335, n. 15:

> "Disparate treatment such as alleged in the present case is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex or national origin. *Proof of discriminatory motive is critical*, although it can in some situations be inferred from the mere fact of differences in treatment. *See, e.g., Village of Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U. S. 252, 265-266." (Emphasis added.)

It is quite clear that the Court of Appeals made no finding of discriminatory intent or motive. The appellate opinion is singularly devoid of any such finding.[44] Indeed, such a finding could not be made in light of Furnco's attempts to increase minority

44. The District Court specifically found a complete absence of invidious racial motivation. Thus, it found: "Plaintiffs have failed to prove that [Furnco's hiring] policies were racially pretextual or discriminatory in application." (C. A. at A21; Conclusions ¶ 6.)

hiring, and the work force figures reflecting the overwhelming success of Furnco's minority hiring policy. As this Court underscored in its decision in *Washington* v. *Davis*, 426 U. S. 229, 246 (1976), statistics and attempts to recruit minority employees, as well as the legitimacy of an employer's hiring practices, clearly go to establish or negate such intent or such purposeful discrimination:

> "[W]e think the District Court correctly held that the affirmative efforts of the Metropolitan Police Department to recruit black officers, the changing racial composition of the recruit classes and of the force in general, and the relationship of the test to the training program negated any inference that the Department discriminated on the basis of race or that 'a police officer qualifies on the color of his skin rather than ability.' "

That such discriminatory motive or intent is a necessary element of a complaining party's *prima facie* burden of proof in a disparate treatment case is an entirely proper requirement.[45] For example, the historical definition of discrimination has included proof of motive or intent.[46] *See General Electric Co.* v. *Gilbert*, 429 U. S. 125, 145 (1976); *Washington* v. *Davis*, 426 U. S. 229 (1976).

45. As noted in Schlei & Grossman, *Employment Discrimination Law* 1153-54 (1976):

> "When approaching the proof or disproof of a disparate treatment case, the ultimate focus of the inquiry, and thus the proof, is whether or not the decision or action in question was 'racially premised.' In other words, motivation and intent are the ultimate issue—whether 'the presumptively valid reasons for [the] rejection were in fact a cover-up for a racially discriminatory decision'—in contrast to the two other theories of discrimination, which focus on the 'consequences of employment practices, not simply the motivation.' " (Footnotes omitted.)

46. *See Long* v. *Ford Motor Co.*, 496 F. 2d 500, 505-06 (6th Cir. 1974):

> "A person alleging a § 1981 violation must first establish that his employment terms vary from those which his employer accords to similarly situated white workers. This can be shown by proof either that intentional racial prejudice entered into his treatment or that a facially neutral practice (here Appellant's performance evaluation system) operates discriminatorily against minority employees."

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Certainly, motive or intent are an essential element of proof in a discrimination case under the most analogous statute, the National Labor Relations Act, 29 U. S. C. § 141 *et seq.* As this Court noted in *Radio Officers' Union* v. *NLRB*, 347 U. S. 17, 43, 44 (1954):

> "The relevance of the motivation of the employer in such discrimination has been consistently recognized under both Section 8(a)(3) and its predecessor . . . That Congress intended the employer's purpose in discriminating to be controlling is clear."

This Court in interpreting Title VII has turned to the NLRA.[47] Thus, in *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747, 768 (1976), it held:

> "Settled law dealing with the related 'twin' areas of discriminatory hiring and discharges violative of National Labor Relations Act, 29 U. S. C. § 151 *et seq.*, provides a persuasive analogy."

That Congress intended the NLRA definition of discrimination to apply in Title VII cases emanates from the legislative history.[48] Thus, in response to various questions posed by

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See generally Croker v. *Boeing Co.*, 437 F. Supp. 1138, 1181 (E. D. Pa. 1977), holding that intentional discrimination is a necessary component of a claim under Section 1981.

47. For example, in *McDonnell Douglas*, 411 U. S. at 803-04, this Court found relevant a case decided under the NLRA, *NLRB* v. *Fansteel Corp.*, 306 U. S. 240 (1939), as to the propriety of discharging an employee for engaging in an illegal stall-in.

48. That intent is an essential element of discrimination as understood by Congress is clear from the Senate debate on Title VII. In a colloquy with Senator Ervin, Senator Case, a floor manager of the bill, noted, 110 Cong. Rec. at 7255, 7257:

> "The only question that would arise would be 'Why?' The question would be, Why was the man refused? There would be tangible acts for the court to consider. It is not only a matter of whether a man is thinking bad thoughts. Any effort on the part

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Senator Dirksen, Senator Clark, one of the Senate floor managers of Title VII, submitted a memorandum regarding various aspects of the legislation. The following was contained in that memorandum, 110 Cong. Rec. at 7218:

> "Objection: The language of the statute is vague and unclear. It may interfere with the employers' right to select on the basis of qualifications.
>
> "Answer: Discrimination is a word which has been used in State FEPC statutes for at least 20 years, and has been used in Federal statutes, such as the National Labor Relations Act[49] and the Fair Labor Standards Act, for even a longer period. To discriminate is to make distinctions or differences in the treatment of employees, and are prohibited only if they are based on any of the five forbidden criteria (race, color, religion, sex or national origin); any other criteria or qualification is untouched by this bill."

Indeed, an analysis of this Court's cases under the NLRA demonstrates a striking resemblance to the dichotomy posited in *Teamsters* between disparate impact and disparate treatment and its holding that proof of motivation is unnecessary in the former and essential in the latter.

That discriminatory motivation is unnecessary in a *Griggs*-type case and will be found to constitute discrimination in the

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(Footnote continued from preceding page.)

> of the Senator to state this point in his own way does not change the situation. Whether or not a course of conduct is actionable depends on the state of mind of the actor. I do not find this to be strange in any degree."
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> * * * * *
>
> "I suggest that the bill would take effect only when the employer had knowingly discriminated against an employee or a prospective employee because of race, color of the skin, creed, or national origin."

49. Significant also is the fact that, as noted by this Court in *Albemarle*, 422 U. S. at 419, "The backpay provision [of Title VII] was expressly modeled on the backpay provision of the National Labor Relations Act." In both instances, of course, backpay is imposed to remedy discrimination. Given the same cause of action—discrimination—and the same remedy—backpay—clearly, the burdens of proof under both statutes should be similar.

absence of business necessity has a ready parallel in cases under Section 8(a)(3) of the NLRA. The clearest example of this is *NLRB* v. *Erie Resistor Corp.*, 373 U. S. 221 (1963). In that case, the NLRB and this Court found that the granting of superseniority to strike replacements constituted conduct inherently destructive of employee rights. As to the absence of any independent evidence of motive or intent, this Court held, 373 U. S. at 231:

> "We think the Board was entitled to treat this case as involving conduct which carried its own indicia of intent and which is barred by the Act unless saved from illegality by an overriding business purpose justifying the invasion of union rights."

As noted in *NLRB* v. *Brown*, 380 U. S. 278, 282 (1965):

> "[T]he Board need not inquire into employer motivation to support a finding of an unfair labor practice where the employer conduct is demonstrably destructive of employee rights and is not justified by the service of significant or important business ends."

The *Griggs* formulation under Title VII is no different. It says nothing more than that proof of motive is unnecessary in establishing a Title VII claim of racial discrimination where the effect of employer conduct has a clearly disparate impact on blacks and is not justified by business necessity. Either motive is simply unnecessary in such cases or such "conduct carries with it 'unavoidable consequences which the employer not only foresaw but which he must have intended' and thus bears, 'its own indicia of intent,'" *NLRB* v. *Great Dane Trailers, Inc.*, 388 U. S. 26, 33 (1967).

But in the absence of such inherently destructive conduct, it is plain that proof of motivation or intent is a necessary element to a claim of discrimination under the NLRA. In such circumstances "to find a violation of Section 8(a)(3), . . . the Board must find that the employer acted for a proscribed purpose." *American Ship Building Co.* v. *NLRB*, 380 U. S. 300, 313

(1965). *See also Textile Workers Union* v. *Darlington Mfg. Co.*, 380 U. S. 263 (1965); *NLRB* v. *Brown, supra.* Unlawful motivation is at the core of discrimination under the NLRA, as "It has long been established that a finding of violation under [Section 8(a)(3)] will normally turn on the employer's motivation." *American Ship Building*, 380 U. S. at 311.

Plainly, if Respondents had alleged that they were not hired on this job because of their union activities, they would have had to demonstrate that Furnco's refusal to hire them was motivated by their union activities or that Furnco subjectively intended to treat them disparately because of their union activities. Respondents should bear no lesser burden when they allege that they were not hired because of their race.

CONCLUSION

The decision of the Seventh Circuit herein does not and indeed cannot be squared with the mainstream of civil rights cases decided by this Court. The Court of Appeals fundamentally misconstrued its role and the appropriate legal standards in reviewing the District Court's findings as to the legitimacy and job-relatedness of the hiring system at issue here. Moreover, it singularly misinterpreted what constitutes the standards of legitimacy and business necessity. And, by taking a restrictive view of the employer's hiring practices, the Court of Appeals not only erroneously interpreted the civil rights acts, but also totally ignored the statistical evidence which demonstrated that rather than excluding black bricklayers, Furnco purposely sought them out and hired them. Finally, as the decision below found disparate treatment, in the absence of any discriminatory intent or motive, the decision is a clear departure from the law as now settled by *Teamsters*. In light of the full hearing before the District Court and its findings, we, therefore, respectfully request that this Court enter an Order

reversing the decision of the Court of Appeals and affirming the decision of the District Court.

Respectfully submitted,

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Appendix

APPENDIX

Relevant portions of Title VII of the Civil Rights Act of 1964, as amended, 42 U. S. C. § 2000-e *et seq.*

Sec. 703. (a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin. . . .

* * * * *

(h) Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by a quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this title for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 6(d) of the Fair Labor Standards Act of 1938, as amended (29 U. S. C. 206(d)).

Sec. 706. (g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlaw-

ful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 704(a).

42 U. S. C. § 1981:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Relevant portions of the National Labor Relations Act, as amended, 29 U. S. C. § 141 *et seq.*

> Sec. 8.(a) It shall be an unfair labor practice for an employer—
>
> * * * * *

> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: . . . .